IN THE

SUPREME COURT OF THE UNITED STATES

* * *

OCTOBER TERM, 1978

* * *

NO. 77-6817

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MAURICE McELWEEE,
Petitioner

V.

~~W. J. ESTELLE, JR., DIRECTOR,~~ TEXAS
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent

* * *

On Petition For Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

* * *

BRIEF FOR RESPONDENT IN OPPOSITION

* * *

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

JOE B. DIBRRELL, JR.
Assistant Attorney General
Chief, Enforcement Division

BARBARA M. BARRON
Assistant Attorney General

ATTORNEYS FOR RESPONDENT

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

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OPINION BELOW

In a per curiam opinion delivered March 14, 1978, the Texas Court of Criminal Appeals affirmed Petitioner's conviction. That Court rejected, inter alia, Petitioner's contention that his conviction was obtained in violation of the Fifth Amendment double jeopardy clause. In its opinion, delivered three months prior to this Court's ruling in Crist v. Bretz, ____ U.S. ____, 98 S.Ct. 2156 (1978), the Texas Court acknowledged the difference between the federal rule regarding the attachment of jeopardy and the longstanding Texas rule which provides that jeopardy does not attach until the jury is selected and sworn and the defendant pleads to the indictment but affirmed the application of the Texas rule in the context of Petitioner's claim of federal constitutional deprivation.

JURISDICTION

Petitioner has properly invoked the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

Respondent belives that only one question is presented for review by this Court and that it should be stated as follows:

Did jeopardy attach under Petitioner's first indictment through the retroactive application of this Court's recent ruling in Crist v. Bretz, supra?

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner relies on the Fifth and Fourteenth Amendments to the United States Constitution in presenting his claims.

STATEMENT OF THE CASE

In October of 1974, Petitioner was indicted for murder in state court. This indictment did not allege any prior felony convictions for enhancement. The case was called for trial on February 4, 1975, and the jury was impaneled and sworn. Because the Court was then engaged in another trial, the jury was admonished and told to return on February 7, 1975. The indictment was not read to the jury and Petitioner did not enter his plea. On February 7, 1975, the Court was still engaged in another trial and the jury was told to return on February 10, 1975. On February 7, 1975, in a hearing before the Court without the jury the State announced that it had discovered that Petitioner had prior felony convictions, and submitted a motion that the indictment be dismissed so that Petitioner could be reindicted with the prior felony convictions alleged for enhancement. The motion to dismiss the indictment was granted over Petitioner's objection. Petitioner was subsequently reindicted in March, 1975, with two prior felony convictions alleged for enhancement. Petitioner raised his former jeopardy claim prior to the beginning of his trial on the new indictment. The trial court overruled Petitioner's claim of former jeopardy.

ARGUMENT AND AUTHORITIES

Jeopardy Did Not Attach Under Petitioner's First Indictment Because This Court's Recent Ruling in Crist v. Bretz, U.S. , 98 S.Ct. 2156 (1978) Is Not Retroactive.

The facts in this case are undisputed. Petitioner's first indictment was dismissed over Petitioner's objection

after the jury had been impaneled and sworn, but before the indictment was read to the jury and before Petitioner entered his plea. Petitioner was then reindicted and two prior felony convictions were alleged for enhancement purposes.

Under the Texas rule at that time, jeopardy did not attach until the defendant plead to the indictment. Lockridge v. State, 522 S.W.2d 526 (Tex.Crim.App. 1975); Vardas v. State, 518 S.W.2d 826 (Tex.Crim.App. 1975), cert. denied, 423 U.S. 904, 96 S.Ct. 206 (1975); Ochoa v. State, 492 S.W.2d 276 (Tex.Crim.App. 1973); Ramirez v. State, 352 S.W.2d 131 (Tex.Crim.App. 1961); Steen v. State, 242 S.W.2d 1047 (Tex.Crim.App. 1922); Yerger v. State, 41 S.W.2d 621 (Tex.Crim.App. 1897); Anderson v. State, 7 S.W.2d 40 (Tex.Crim.App. 1886). Because the first indictment was dismissed before it was read to the jury and before Petitioner entered his plea, jeopardy had not attachedunder the Texas rule.

This Court's recent ruling in Crist v. Bretz, ___ U.S. ___, 98 S.Ct. 2156 (1978), established that:

> ...the federal rule that jeopardy attaches when a jury is impaneled and sworn is an integral part of the constitutional guarantee against double jeopardy.

Id. at 2162. Accordingly, this Court held that the federal rule setting the point at which jeopardy attaches is binding on the state.

Respondent submits that the question of whether jeopardy attached to Petitioner's first indictment is wholly dependent on whether this Court's ruling in Crist v. Bretz, supra, is to be given retroactive effect.

The Court set forth the criteira for determining the retroactive effect of ruling involving the double jeopardy provision of the Constitution in Robinson v. Neil, 409 U.S. 505, 93 S.Ct. 876 (1973). Although the criteria which had been put forward in Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731 (1965), were characterized as "not appropriate" in the context of double jeopardy claims, this Court continued to emphasize the "...element of reliance embodied in the Linkletter analysis..." Robinson v. Neil, supra, at 409 U.S. 509, 93 S.Ct. 878.

The State of Texas has relied on the constitutional validity of its own rule setting the time at which jeopardy attaches. Not until its ruling in Crist v. Bretz did this Court explicitly rule that the federal rule regarding the attachment of jeopardy was an integral part of the constitutional guarantee against double jeopardy. The State has relied on the constitutionality of its jeopardy attachment rule. Its continuing reliance is exemplified by a recent case, Vardas v. State, supra. In that case, a defendant was indicted on two counts -- robbery by assault and robbery by firearms. (Both counts related to the same transaction.) The Court limited the state to trial on the second count of the indictment. The defendant did not plead to the first count, and the first count of the indictment was not read to the jury. The first trial resulted in a conviction based on the second count, robbery by firearms, which was later reversed by the Texas Court of Criminal Appeals. The defendant was then retried, over his double jeopardy objection, on the first count of the indictment, and was convicted. The Texas Court of Criminal Appeals relying on its ruling on Ochoa v. State, supra, held that jeopardy does not attach until the defendant pleads to the indictment. This Court denied certiorari to the Texas Court of Criminal Appeals in the Vardas case.

The Vardas case illustrates that the stance of this Court on the constitutional validity of variant state rules on the point of jeopardy attachment was not clear to the state prior to the Crist v. Bretz ruling. The mere fact that the federal rule as to when jeopardy attaches has long been established does not, without more, establish that the federal rule is constitutionally mandated and therefore binding on the states. Certainly, reasonable persons have differed as to whether the general rules concerning attachment of jeopardy, previously announced by this Court in cases such as Serfass v. United States, 420 U.S. 377, 95 S.Ct. 1055 (1975), were of constitutional dimension. Accordingly, retroactive application of the Crist v. Bretz ruling would result

in the unfair overturning of convictions obtained by the state in good faith reliance of its own jeopardy attachment rule. In this case, had the State had reason to doubt the constitutional validity of its rule, it could have simply proceeded to try Petitioner on the original indictment without the enhancement counts. That the State chose instead to dismiss the original indictment and reindict Petitioner to bring in the enhancement counts clearly reflects the State's reliance on the constitutional validity of its rule.

The State's reliance on the constitutionality of its rule is well founded, notwithstanding suggestive language in earlier decisions by this Court that the federal rule may be constitutionally mandated. Where there is a wide variance between the point at which jeopardy attaches under the state rule and the federal rule, if the federal rule is constitutionally mandated, then clearly the federal rule must surplant the state rule. For example, a state rule which provided that jeopardy did not attach until the defense began to present evidence would clearly fail to adequately safeguard constitutional rights against double jeopardy. The federal rule providing for attachment of jeopardy in the earliest stages of trial would clearly be preferable on constitutional grounds to such a state rule. Prior to this Court's ruling in Crist v. Bretz, supra, however, the State could reasonably believe that further fine tuning of its rule as to the attachment of jeopardy was not constitutionally required. It is important to note that the temporal difference between the attachment of jeopardy under the federal rule and under the Texas rule would typically be on the order of one or two minutes. Immediately after the jury is impaneled and sworn the accused is arraigned -- the indictment is read and the accused enters his plea. Thus, where the state and federal rules provide for attachment of jeopardy at such close points in the trial, the State's belief in the constitutional validity of its rule is imminently reasonable.

CONCLUSION

Retroactive application of the ruling in Crist v. Bretz,

supra, would only result in the overturning of convictions obtained in good faith reliance on the constitutional validity of the Texas rule. Respondent contends that the lengthy history of the Texas rule and the reasonableness of the State's reliance on the validity of its rule, militate strongly against the retroactive application of this Court's ruling in Crist v. Bretz, supra. Therefore, Respondent asserts that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

JOE B. DIBRELL, JR.
Assistant Attorney General
Chief, Enforcement Division

Barbara M Barron
BARBARA M. BARRON
Assistant Attorney General

ATTORNEYS FOR RESPONDENT

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